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## Engaging the Spirit of Racial Healing Within Critical Race Theory: An Exercise in Transformative Thought

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# ENGAGING THE SPIRIT OF RACIAL HEALING WITHIN CRITICAL RACE THEORY:AN EXERCISE IN TRANSFORMATIVE THOUGHT

Rebecca Tsosie\*

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## INTRODUCTION

In evaluating the future of Critical Race Theory (CRT), Professors Richard Delgado and Kevin Johnson engaged in a dialogue about whether CRT has become too “idealist” in its focus and too concerned about the “discourse of inequality,” as opposed to the “materialist” view that we must direct our focus toward tangible power disparities—illustrated by problems within substantive areas such as criminal justice, housing discrimination, and employment discrimination—which require restructuring at a foundational level.<sup>1</sup> At another level, this debate asks whether we can continue to focus on “racial” injustice and overlook the economics of class injustice, which is central to both domestic and global disparities among groups and populations. That question is also one of the starting points for Professor Torres’ and Guinier’s work on “political race” in *The Miner’s Canary*.<sup>2</sup>

This essay posits that CRT must operate at both the “idealist” and “materialist” levels. Although the emphasis may be in one direction or another at particular times, both domains are continually engaged. This essay links the debate between the “materialist” and “idealist” views to

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1. Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing about Race*, 82 TEX. L. REV. 121 (2003); Kevin R. Johnson, *Roll Over Beethoven: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 717 (2004).

2. LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY*, 11, 22 (2002).

another central theme within CRT, which is the need for “justice” and how the law relates to justice. This essay focuses on the contemporary debate surrounding the status of Native Hawaiians to show how “race” is being used to construct the civil and political rights of Native Hawaiian people. CRT is a jurisprudence of possibility precisely because it rejects standard liberal frameworks and precisely because it seeks to be inclusive of different groups and different experiences. As I envision the future of CRT, I want to engage a discussion about “justice” and the relationship of justice to political or racial healing. Thus, this essay seeks to identify the foundation for CRT, as the need to achieve “social justice” for groups that have suffered a history of oppression, and to engage what it means to “heal” injustice which is embedded in society at the level of both structure and consciousness. Part I of the essay explicates the scholarly debate between Professors Delgado and Johnson and offers three general themes which are useful to understand CRT as a vehicle for transformative thought in American jurisprudence. Part II probes the relationship of justice to law, drawing on contemporary work in political theory dealing with transformative political change, and sets the framework for the case study on contemporary Native Hawaiian political and legal rights, which is featured in Part III. In analyzing the case study, this essay examines the historical context within which Native Hawaiian rights are situated, and compares the analysis in the federal court cases that are constructing contemporary Native Hawaiian rights as well as the rights of non-Natives. Finally, Part IV of the essay explores the theme of racial healing and suggests how the idealist and materialist frameworks of thought within CRT might be used to effectuate the necessary change.

#### I. UNDERSTANDING CRT AS A VEHICLE FOR TRANSFORMATIVE THOUGHT

Professor Delgado initiates his critique with the premise that CRT had a “promising beginning,” but then “began to focus almost exclusively on discourse at the expense of power, history, and similar material determinants of minority-group fortunes.”<sup>3</sup> Professor Delgado identifies a key issue: “are race and racism, at bottom, real, or are they social constructions?”<sup>4</sup> He claims that this question is at the center of a “largely unrecognized” divide within CRT and modern progressive thought in general. The “idealist” school holds that race and discrimination are largely functions of attitude and social formation.<sup>5</sup> Race is a “social con-

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3. Delgado, *supra* note 1, at 122.

4. *Id.* at 123.

5. *Id.*

struction created out of words, symbols, stereotypes and categories.”<sup>6</sup> Combatting discrimination, then, requires us to “rid ourselves of the texts, narratives, ideas and meaning that give rise to it and convey” negative messages about particular racial groups. Scholars working from this perspective use discourse analysis to analyze hate speech, cultural imagery, and census categories, as well as to evaluate issues such as “intersectionality” and “essentialism” to identify unconscious or institutional racism, which is the pernicious, but hidden, force behind tangible inequalities.<sup>7</sup>

In comparison, scholars within the “realist” or “materialist” school agree that text, attitude and intention are important in constructing social hierarchies, but they believe that “material factors such as profits and the labor market are even more decisive in determining who falls where in that system.”<sup>8</sup> Racism is a mechanism to apportion privilege, wealth, and status.<sup>9</sup> Racial realists “examine the role of international relations and competition, the interests of elite groups, and the changing demands of the labor market” in order to identify how racial groups benefit or suffer at particular times in history.<sup>10</sup> The legal system is a key institution in this process because it either sanctions or punishes racial discrimination, depending upon which larger goal is at play. Professor Delgado claims that in the early years the realist analysis dominated CRT, and he cites several examples, including Derrick Bell’s “interest convergence” theory, which maintained that “the self interest of elite Whites determined civil rights progress more than conscience or altruism did.”<sup>11</sup> Today, Professor Delgado says, “CRT is almost entirely dominated by the analysis of text, discourse, and mindset, leaving huge deficiencies in our understanding of the institutional role of racism in society and the way that law is being used to tailor solutions that serve the interests of dominant groups.”<sup>12</sup>

Professor Johnson’s response notes the important intersections between the two schools of thought and suggests that Delgado “overstates the distinction between ideal and material forms of discourse.”<sup>13</sup> According to Johnson, there are deep interrelationships between the two schools of thought that require “a study of both, as well as how they are connected.”<sup>14</sup> In particular, idealist discourse promotes an understanding of how society rationalizes the racial subordination created by power disparities.<sup>15</sup> For example, Johnson notes that poor education and few

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6. *Id.*

7. *See id.*

8. *Id.*

9. *Id.* at 124.

10. *Id.*

11. *Id.*

12. *Id.* at 124–25.

13. Johnson, *supra* note 1, at 719.

14. *Id.* at 720.

15. *Id.*

employment opportunities for minorities results in economic inequality.<sup>16</sup> Whites materially benefit from this, and minorities suffer. Because Whites have a vested interest in the economic status quo, they will use various strategies to justify its continuation, drawing upon negative cultural images, "shared understandings," and an "ideology" or "received wisdom" that is passed down through time to make "current social arrangements seem fair and natural."<sup>17</sup> Johnson's analysis is based in large part upon Delgado's earlier work endorsing the "legal storytelling movement."

Both Delgado and Johnson are important scholarly voices in CRT, and both are correct in the sense that they are identifying what is necessary to further the development of the scholarly work in CRT, which has always been focused on addressing important justice issues for people of color. Furthermore, the dialogue inspires CRT scholars to continue to "push the margins," to be unafraid of the criticisms of outsiders, and to continue to grow and evolve the intellectual discipline as social conditions change. However, I think there is a larger point to be made. CRT is now in a position to develop a transformative ethic by which to critique law, social institutions, and American jurisprudence.<sup>18</sup> I would suggest that there are three broader themes within CRT scholarship that enable it to become a vehicle for transformative thought in American jurisprudence.

First, CRT is an organizational concept for generating knowledge about injustice—social, economic, and legal—and the way injustice is operationalized within our society. Thus, as Professor Brooks has noted, CRT brings together various race-based theories, values and attitudes in order to critique the existing legal and political order.<sup>19</sup> The "standard" law school curriculum is often bereft of alternatives to the formalistic Anglo-American liberal epistemology that governs our jurisprudence. CRT has become a liberating discourse within American law because it supports the view (Which is experienced by many people of color, but not generally acknowledged by jurists from the dominant American legal tradition) that racism is REAL, and that American society and its institutions are fundamentally racist at some level, in the sense that racism is the norm and NOT a deviation from the norm in American society. Now, we can all split hairs about what we MEAN by "race" and "racism" and whether the racism is "structural" or "procedural." But that initial observation about what is the normative basis for American jurisprudence is very important.

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16. *Id.*

17. *Id.* at 720–21 (quoting Delgado's earlier work on legal storytelling).

18. Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85 (1994) (pulling together the discipline of CRT around "four recurring intellectual themes: common objective; methodology; values and assumptions; epistemology").

19. *Id.* at 85–86.

Second, scholars of CRT are generally working toward some view of "racial equality."<sup>20</sup> In other words, if racism is the "norm" in American society, then we ought to be working toward a norm of "racial equality" where different groups will not continue to suffer the oppression and subordination that they have suffered. Again, much of the literature in this area asks whether equality should be "symmetrical" in the sense that all groups are truly treated the "same" or whether "assimilation" would result from this.<sup>21</sup> Conversely, if we take into account that groups are situated differently and must necessarily be treated "differently" if parity is ever to be achieved, then how do we ensure "justice" under an "asymmetrical" model? The discussion over "symmetrical" or "asymmetrical" equality is important and valid, but the bottom line is that everyone agrees that the current structure is not fair, that the historical conditions for injustice are vast and pervasive and the effects of this history continue into the present, and that we ought to be working toward "racial justice," however we understand that concept.<sup>22</sup>

Finally, a major accomplishment of CRT is to legitimize a jurisprudence that is based in part on an experiential epistemology, rather than a purely rationalist epistemology.<sup>23</sup> The dominant approach within American legal education is founded upon the rationalist epistemology that undergirds American law and jurisprudence.<sup>24</sup> Students are taught to analyze the logic of cases and doctrines, to distinguish between "relevant" facts and those not relevant to the "holding," and to generate arguments that appeal to abstract reason, deductive logic, and empirical validation. American jurisprudence depends upon the rationalist epistemology of Western thought that is entrenched within liberalism. However, liberal theories of justice are often inadequate to engage the disparities and issues identified by CRT scholars. Thus, the experiential epistemology of CRT encompasses the knowledge that stems from the perspectives and

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20. See, Linda Greene, *Race in the Twenty-First Century: Equality Through Law?*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 292-302 (Kimberlé Crenshaw et al., eds. 1995) (discussing several key civil rights cases and the themes of equality that they embody).

21. See Brooks, *supra* note 18, at 92 (discussing two models of racial justice: "symmetrical" and "asymmetrical").

22. See generally Greene, *supra* note 20.

23. Brooks, *supra* note 18, at 98 (discussing the experiential epistemology within CRT and the observations of CRT proponents that "a rationalist epistemology has limited transformative capabilities, because it does not challenge the normative values underlying much of traditional legal scholarship.").

24. See Margaret Montoya, *Mascaras, Trenzas, y Greñas: Un/masking the Self While Un/braiding Latina Stories and Legal Discourse*, 15 *CHICANO-LATINO L. REV.* 1 (1994); 17 *HARV. WOMEN'S L.J.* 185 (1994). (discussing author's experience as a 1L at Harvard Law School, where she was instructed that her perspective as a Latina was irrelevant for purposes of analyzing a criminal law case involving a Latina mother who was charged with manslaughter in connection with the death of her newborn son, and that she was to "think like a lawyer.")

experiences of those people who HAVE suffered and continue to suffer oppression and injustice. Truth and knowledge are based on experience, and this experience has a transformative power. In this sense, CRT validates an intellectual movement that has existed for a very long time. The truth of alternative epistemologies was present, for example, in Martin Luther King's writings, speeches and sermons.<sup>25</sup> It is similarly present in the writings of scholars such as Vine Deloria, Jr., who is the most widely published Native scholar in history and although not a "critical race" scholar, has developed a Native epistemology and voice that continue to offer intellectual leadership to contemporary political, social and economic issues.<sup>26</sup>

In summary, there are three pillars of CRT that are essential to generating transformative thought: (1) interrogating the normative basis of the law to generate new knowledge about justice; (2) advancing a notion of racial justice as indispensable; and (3) validating an experiential epistemology to understand the role and effects of law. It is this creative spirit that is fundamental to the growth and development of CRT. CRT constructs an alternative reality within which to critique the existing social and legal order. That reality is flexible enough to give rise to other strands and themes, such as the notion of "political race," which is explicated by Torres and Guinier in *The Miner's Canary*.<sup>27</sup> The notion of "political race" is transformational because it is an interracial project that addresses "insider/outsider" strategies as part of democratic politics. It builds on the CRT paradigm, but also transcends that paradigm. The authors of *The Miner's Canary* acknowledge that theirs is a visionary project, akin to "magical realism"—the ability to infuse reality with a transcendent quality that distorts the "physical and temporal" basis of reality to allow people to see familiar things in a completely different context.<sup>28</sup> In that sense, the change in context is pivotal because it provides the foundation to generate radically different meanings. By stepping outside standard categories, there are new things to see about how we define and deal with racial inequality, class disparities, and the notion of "discrimination." As Torres and Guinier observe, "[g]uided by a more inclusive vision of both democracy and justice, the political race project seeks to mobilize people initially

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25. See Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, *supra* note 20, at 85–102 (discussing Dr. King's work as giving rise to a "reconstructive vision of community").

26. See, e.g., VINE DELORIA, JR., *FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA* (1999) (comprising a number of essays by Vine Deloria critiquing the institution of religion in American society). In particular, Deloria's essays on the liberation theology movement intersect with the themes of Dr. King's work, and offer a comparative approach to standard critiques of the role of religion in American society.

27. GUINIER & TORRES, *supra* note 2, at 11.

28. *Id.* at 22.

around a frame of racial inequity and then move them beyond their starting point.”<sup>29</sup>

This essay builds on the point made by Guinier and Torres and examines the relationship of justice to the law in times of political transformation. By evaluating insights from other disciplines about the “idealist”/“realist” divide, and then applying this discussion to a contemporary case study of political change, we can further understand the important intersections that the scholarly debate within CRT has illuminated.

## II. THE RELATIONSHIP OF JUSTICE TO THE LAW

In her book *Transitional Justice*, Ruti Teitel examines how “justice” is conceived in periods of political transition.<sup>30</sup> Her book is primarily concerned with the massive political transition that occurs when dictatorships and totalitarian regimes are overthrown in favor of building new democracies.<sup>31</sup> However, the central quandary in such societies—how should societies deal with their evil pasts—is also one that the United States must engage with respect to “race relations.” Similarly, as Guinier and Torres have identified through the use of “political race,” democracies are forced to undertake institutional change in order to achieve “justice” for historically disempowered groups.<sup>32</sup> Interestingly, Teitel discusses the conception of justice as fraught with a divide similar to that which exists within CRT.<sup>33</sup> Teitel claims that in the debates about the relation of law and justice to liberalization, there are two generally competing analyses on the relationship of law to democratic development, represented by the “realist” and “idealist” perspectives.<sup>34</sup> Both perspectives are concerned with the relationship of law and justice to liberalization and thus are concerned with identifying the best legal responses to encourage democracy. In other words, both interrogate how legal acts can facilitate “transformation” of political regimes.

According to Teitel, “political realists generally conflate the question of why a given state action is taken with that of what response is possible.”<sup>35</sup> Very simply, they see law as a “mere product of political change.”<sup>36</sup> This explains why transitional justice is a vital issue in some countries, but not in others. The realists believe that the prevailing balance of political

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29. *Id.* at 30.

30. RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000).

31. *Id.*

32. See, e.g., GUINIER & TORRES, *supra* note 2, at 168–22 (analyzing the role of political race in “democratic renewal”).

33. TEITEL, *supra* note 30, at 3–9.

34. *Id.* at 3.

35. *Id.* at 3–4.

36. *Id.* at 3.



power structures the “path” of the transition, and thus explains the legal response. In comparison, Teitel notes, scholars from the “idealist perspective” address the question of transitional justice by relying on universalist conceptions of justice.<sup>37</sup> These scholars believe that concepts of full retributive or corrective justice regarding the past are necessary precursors to liberal change. Teitel claims that the realist/idealist divide on justice in times of transition is “essentially a divide over the relationship of law to politics.”<sup>38</sup> Under liberal theory, which dominates the discussion of international law and politics, law is commonly conceived of as “following idealist conceptions.”<sup>39</sup> Liberal theorists tend to negate the role of political context, believing that higher norms of human rights law, for example, can trigger political change.<sup>40</sup> In comparison, the realists maintain that law is merely a product of politics.<sup>41</sup> Nations “do what they can,” based on the circumstances that they face.<sup>42</sup>

According to Teitel, both accounts miss “the particular significance of justice claims in periods of radical political change” and fail to explain “the relation between normative responses to past injustice and a state’s prospects for liberal transformation.”<sup>43</sup> Both accounts fail because they are incomplete. The realists fail because they conflate the descriptive account of what is possible with its normative conclusions.<sup>44</sup> The idealists fail because abstract theorizing does not account well for the relation of law and political change, nor does it capture what is “distinctive about justice in times of transition.”<sup>45</sup> In short, the “realist/idealist” divide, like the divide between liberal and critical theorists, bifurcates the relation of law to politics. It is necessary, Teitel argues, to move beyond these paradigms to explore the role of the law in periods of radical political transformation.<sup>46</sup> Legal responses play an “extraordinary, constitutive role” in such periods.<sup>47</sup> Teitel claims that “the conception of justice in periods of political change is extraordinary and constructivist: It is alternatively constituted by, and constitutive of, the transition.”<sup>48</sup> Teitel perceives the conception of justice as “contextualized and partial.”<sup>49</sup> What is “deemed just is contingent and

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37. *Id.* at 4.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 6.

49. *Id.*

informed by prior injustice.”<sup>50</sup> Teitel examines various forms of law in different societies, directed toward “punishment, historical inquiry, reparations, purges, and constitution making.”<sup>51</sup> Her ultimate conclusion is that law is both shaped by political circumstances and itself structures the transition.<sup>52</sup>

The focus of Teitel’s work is on understanding how legal structures operate to facilitate justice in societies that are experiencing transformative political change. In comparison, much of CRT is concerned with understanding how legal structures operate to continue oppressive social, political and economic conditions and to justify maintaining conditions of “injustice” in the United States, which is, by most accounts, a “liberal, democratic” society.<sup>53</sup> Teitel’s work sees democratization as “justice.” CRT sees “justice” as dependent upon institutional changes within the democracy.<sup>54</sup> Both accounts question the way law is used to achieve justice. But what does “justice” mean? As the next section of this essay demonstrates, that question is informed by historic and contemporary contexts, as well as the lived experience of the groups that are directly impacted by the laws and policies at issue. In the next section, this essay analyzes the debate over contemporary Native Hawaiian political rights in order to illustrate the complexities and promise of transformational justice.

### III. THE NATIVE HAWAIIAN CASE

A recent New York Times headline focused national attention on the heated debate occurring in Hawaii: “Bill Giving Native Hawaiians Sovereignty Is Too Much for Some, Too Little for Others.”<sup>55</sup> The article discussed pending legislation sponsored by Hawaii’s Senators Daniel Akaka and Daniel Inouye, “The Native Hawaiian Government Reorganization Act.”<sup>56</sup> The Act would formally acknowledge a political relationship between the United States and the Native Hawaiians and lead to the creation of a governing body for Native Hawaiians similar to the tribal councils possessed by many Native American Nations.<sup>57</sup> The Native Hawaiian governing body would then be empowered to negotiate with the United States and state of Hawaii over portions of the vast amounts of land and resources that were taken from the Kingdom of Hawaii in the

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50. *Id.*

51. *Id.*

52. *Id.*

53. TORRES & GUNIER, *supra* note 2, at 34–37.

54. See GUINIER & TORRES, *supra* note 2, at 168–222.

55. Dean E. Murphy, *Bill Giving Native Hawaiians Sovereignty Is Too Much for Some, Too Little for Others*, N.Y. TIMES, July 17, 2005, at 14.

56. See S. 147, 109th Cong.; H.R. 309, 109th Cong., “The Native Hawaiian Government Reorganization Act of 2005.”

57. *Id.* at § 4.

19<sup>th</sup> century.<sup>58</sup> Because Native Hawaiians are not eligible to petition for federal recognition on the same basis as Native American groups, the Akaka bill sets up a process by which Native Hawaiians can achieve a status similar, but not identical, to that enjoyed by federally recognized Native American tribes.<sup>59</sup> Of course, there are many challenges to the proposal and many unanswered questions. The bill has not only generated complaints by non-Natives who fear the creation of “special rights” for Native Hawaiians, but it is the subject of an active debate among Native Hawaiians themselves, which is a bit disconcerting to non-Natives, who fail to understand why Native Hawaiians would not universally support a bill that “gives them sovereignty.”<sup>60</sup> The Akaka bill contemplates “political change” and purports to be a mechanism to achieve “justice” for Native Hawaiian people. As such, it is a prime site to apply the theoretical discourse within political theory and critical race theory about “idealist” and “realist” approaches to justice.

### A. Historical Background

Today, the Native people of Hawaii, or Kanaka Maoli, as they refer to themselves, are considered “Native Americans.” However, this was not always the case. The Native Hawaiians are the only indigenous group in the United States to have maintained an independent political status under international law.<sup>61</sup> The Kingdom of Hawaii enjoyed international status as a nation in the 19<sup>th</sup> century and was accorded full diplomatic recognition by the United States, as well as other global nations.<sup>62</sup> The

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58. *Id.*

59. See *Price v. State of Hawaii*, 764 F.2d 623, 626 (9th Cir. 1985) (finding that because a group of Native Hawaiians was not “duly recognized” by the Secretary of the Interior as “an Indian tribe or band,” the group could not maintain a cause of action for purposes of establishing jurisdiction under 28 U.S.C. § 1362, and further noting that Native Hawaiians are expressly excluded from petitioning for federal recognition under 25 C.F.R. Part 83, which prescribes the administrative requirements for American Indian groups to petition for federal recognition).

60. Murphy, *supra* note 55. See also DAVID GETCHES, CHARLES WILKINSON & ROBERT A. WILLIAMS, *FEDERAL INDIAN LAW* 925–27 (5th ed. 2005) (summarizing the debate over the proposed legislation).

61. In comparison, the American Indian Nations and Alaska Native Nations were treated as “domestic dependent nations” under the fiction of the “doctrine of discovery” which held that the first European sovereign to claim and settle lands in the New World got the “title” to the land, and the Native peoples retained only a “right of occupancy.” See, e.g., *Johnson v. McIntosh*, 21 U.S. 543, 563 (1823) (establishing the framework for “aboriginal title,” also known as the Indians’ “right of occupancy”); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) (extending the same analysis to Alaska Native groups).

62. See Kunani Nihipali, *Stone by Stone, Bone by Bone: Rebuilding the Hawaiian Nation in the Illusion of Reality*, 34 ARIZ. ST. L.J. 27, 38 (2002).

Kingdom of Hawaii entered treaties facilitating trade and commerce with the United States, as well as other nations.<sup>63</sup> In 1842, the U.S. Secretary of State, Daniel Webster, wrote that no power ought to take possession of the islands through conquest "or for the purpose of colonization."<sup>64</sup> Thus, the Kingdom of Hawaii was never subjected to the "Doctrine of Discovery" that was used to subordinate Native American rights to land and sovereignty with the legal fiction that, upon discovery and settlement of lands in the New World, the Europeans and their successors in interest (e.g. the United States) received the full title to the land, except for the Indian's "right of occupancy."<sup>65</sup> Under this colonial doctrine, the Native American Nations were divested of their political right to cede lands or enter political alliances with other sovereigns.<sup>66</sup> The sovereigns transferred title to their successors in interest. The right of occupancy entitled the Indians to continue their physical use and occupancy of the lands until the right was extinguished by the sovereign through "purchase or conquest."<sup>67</sup> In comparison, the Kingdom of Hawaii enjoyed international political recognition under the prevailing standards of the time. In accordance with this status, the Kingdom was organized as a constitutional monarchy, possessed a system of recorded land titles, and had a citizenry that was predominantly, but not exclusively, Native Hawaiian.<sup>68</sup>

Despite Webster's remarks in 1842, the United States worked hard to establish a significant commercial and political presence on the Hawaiian

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63. See Dennis Pu'uhonua "Bumpy" Kanahele, *Clandestine Manipulation Toward Genocide*, 34 ARIZ. ST. L.J. 63 (2002) (explaining the history of the Kingdom of Hawaii from the perspective of a contemporary Native Hawaiian political leader); S.147, Cong. § 2 (2005) (affirming under its "findings" that the United States accorded full diplomatic recognition to the Kingdom of Hawaii from 1826–93, and entered several treaties and conventions with the Kingdom of Hawaii to govern commerce and navigation).

64. See Jennifer Chock, *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawaii's Annexation, and Possible Reparations*, 17 U. HAW. L. REV. 463, 463 (1995).

65. See *Johnson*, 21 U.S. 543, 574.

66. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (Chief Justice John Marshall's opinion creates the concept of a "domestic dependent nation," meaning that the Indian nations existed as separate nations, but were so completely "under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.").

67. *Johnson*, 21 U.S. 543, 587 (finding that "discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest").

68. See Poka Laenui, *The Rediscovery of Hawaiian Sovereignty*, 17(1) AM. INDIAN CULTURE AND RES. J. 79, 81 (1993) (explaining the multicultural citizenship of the Kingdom of Hawaii); Office of Hawaiian Affairs, *NATIVE HAWAIIAN RIGHTS HANDBOOK*, 3–10 (Melody Kapilialoha MacKenzie ed. 1991) (explaining the history of the Hawaiian land tenure system).

Islands.<sup>69</sup> By the 1880s, some Americans were convinced that this presence justified treating Hawaii as a "possession" of the United States, although there was no legal basis to do so. The citizens of the Kingdom of Hawaii resisted any attempt to place themselves under the sovereignty of the United States. In 1893, a group of American insurgents, with the help of the U.S. military, seized control of the Kingdom of Hawaii.<sup>70</sup> Queen Liliuokalani issued a conditional and temporary surrender until such time as the United States should honor its treaty obligations and reinstate her as the constitutional sovereign of the Hawaiian islands.<sup>71</sup> President Grover Cleveland established a Commission to look into the issue. The Commission verified that the overthrow was accomplished by the use of "American military intervention against the will of a majority of Hawaiian citizens, in violation of international law as well as American foreign policy."<sup>72</sup> President Cleveland recommended to Congress that it reinstate the Queen. Cleveland found that if a weak but "friendly state" is in danger of being robbed of its independence and sovereignty by an abuse of power, the U.S. should vindicate its honor and sense of justice "by an earnest attempt to make all possible reparations."<sup>73</sup>

Not surprisingly, given the strategic location of the Hawaiian Islands, as well as the commercial value of the industry in the islands, Congress neglected to follow the recommendation. Ultimately, Hawaii was annexed into the United States by the Newlands Joint Resolution of 1898, after an Annexation Treaty failed to pass the Senate.<sup>74</sup> The annexation of the "Republic of Hawaii" occurred without the consent of the Hawaiian people (they could not vote unless they took an oath of loyalty to the Provisional government) and without the political support of the Hawaiian people, who refused to consider the Republic of Hawaii a legitimate government, given that it received its authority through an illegal military coup.<sup>75</sup> In addition, it was unclear that the U.S. Constitution even sanctioned annexation by joint resolution rather than treaty.<sup>76</sup> Despite these obstacles, Hawaii was ultimately admitted to statehood in 1959, purportedly "cur-

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69. See THOMAS J. OSBORNE, *ANNEXATION HAWAII: FIGHTING AMERICAN IMPERIALISM* (1998); SALLY ENGLE MERRY, *COLONIZING HAWAII: THE CULTURAL POWER OF LAW* (2000); Office of Hawaii Affairs, *supra* note 68, at 10–15. (Explaining the history and current importance of the overthrow of the Hawaiian monarchy and annexation of Hawaii as one of the United States).

70. See Office of Hawaiian Affairs, *supra* note 68, at 12.

71. Laenui, *supra* note 68, at 86.

72. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 370 (1987).

73. Office of Hawaiian Affairs, *supra* note 68, at 12; see also Chock, *supra* note 64, at 466 n. 28 (1995).

74. Office of Hawaiian Affairs, *supra* note 68, at 15.

75. See Laenui, *supra* note 68, at 89.

76. See OSBORNE, *supra* note 69, at 112.

ing” all of the egregious legal, moral, and political issues attendant to the original annexation.<sup>77</sup>

### B. Contemporary Politics

At this point, did the Native Hawaiians become just another group of indigenous peoples occupying lands that were “conquered” by the United States? Unlike the Native American Nations, the U.S. government did not act to establish an exclusive trust relationship with the Native Hawaiians.<sup>78</sup> The Kingdom of Hawaii held substantial lands in trust for the Hawaiian people.<sup>79</sup> These lands were transferred to the United States as “ceded lands.”<sup>80</sup> Some of the land was retained in federal ownership for military and national park use.<sup>81</sup> The remainder was transferred to the state of Hawaii, which agreed to hold the land in trust, with part of the proceeds directed toward assisting the Native people.<sup>82</sup> The federal government had already passed legislation in 1921 that created the Native Hawaiian Homes Commission, which undertook to distribute small parcels of land under long-term leases to Native Hawaiians of at least 50% blood.<sup>83</sup> Upon statehood, this program was also transferred to the state to manage.<sup>84</sup> Very few Native Hawaiians ever received homesteads. Although the state ultimately created an agency just to deal with Native Hawaiian issues, the Office of Hawaiian Affairs (OHA), Native Hawaiians are beneficiaries of only a fraction of the value gained from ceded lands and their

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77. See Laenui, *supra* note 68, at 92.

78. S. 147, § 2(20)(A), (C)(2005) (acknowledging that the United States has a special responsibility for the welfare of the native peoples of the United States, including Native Hawaiians, but also recognizing that the United States has delegated broad authority to the State of Hawaii to administer some of its responsibilities as they relate to the Native Hawaiian people and their lands). In comparison, the federal courts have held that state power over Indian tribes and lands is generally preempted by the exclusive federal trust relationship. See *Worcester v. Georgia*, 31 U.S. 515, 520 (1832) (holding that the state of Georgia could not extend its laws over the Cherokee Nation, except with “the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress” because state power over Indian tribes and lands is generally preempted by the exclusive federal trust relationship).

79. Office of Hawaiian Affairs, *supra* note 68, at 10, 16 (describing the legal status of the “Crown lands” of the Kingdom of Hawaii prior to and after annexation).

80. See Brian Duus, *Reconciliation Between the United States and Native Hawaiians: The Duty of the United States to Recognize a Native Hawaiian Nation and Settle the Ceded Lands Dispute*, ASIAN-PAC. L. & POL’Y J. 469, 483 (2003) (discussing the history of the “ceded lands”).

81. Office of Hawaiian Affairs, *supra* note 68, at 18.

82. *Id.* at 18–19 (noting that section 5(f) of the Admission Act requires the state of Hawaii to hold all ceded lands in trust, and details five permissible purposes for the trust, one of which is “for the betterment of the conditions of native Hawaiians”).

83. *Id.* at 17.

84. *Id.* at 18.

associated resources.<sup>85</sup> There is still a great deal of legal uncertainty over the rights to and status of these lands and resources.<sup>86</sup>

Today, Native Hawaiians seek redress for the overthrow of the Hawaiian government, as well as for the loss of land, and mismanagement of trust assets.<sup>87</sup> They consider themselves to be a separate people with political as well as cultural rights.<sup>88</sup> However, their political status is ambiguous because of the very different historical context that has shaped the current situation.

Are Native Hawaiians members of a "nation," a "domestic dependent nation," or a group of "multicultural" and "multiracial" U.S. citizens? And why does it matter? What legal frameworks govern these issues? What is the social context of the dispute? The Akaka Bill is only part of the contemporary picture.

Several important legal and political developments have affected Native Hawaiians in recent years. In a 1993 Joint Resolution, Congress acknowledged the complicity of the U.S. in the overthrow of the Hawaiian monarchy and apologized to the Native Hawaiian people on behalf of the U.S.<sup>89</sup> Congress was careful to note that nothing in the apology should be read as a "settlement of claims," nor would the enactment itself result in any change in the law.<sup>90</sup> However, the Apology Bill calls for a "reconciliation" between Native Hawaiians and the United States.<sup>91</sup>

Ultimately, this bid for "reconciliation" became the impetus for the Akaka bill. The Akaka bill has been through several versions. Its primary function is to grant the Native Hawaiians the right to organize a government that would be recognized by the United States in a manner similar to a Native American tribal council.<sup>92</sup> The Indian Reorganization Act, which was passed in 1934 to prompt tribal governments to adopt a Western model of governance and supplant traditional Native governments, is the template for the Native Hawaiian Government Reorganization Act.<sup>93</sup>

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85. *Id.* at 19–20.

86. *See generally* Duus, *supra* note 80, at 485–89 (discussing the many unresolved issues with the ceded lands trust).

87. Matsuda, *supra* note 72, at 371.

88. *See generally* Laenui, *supra* note 68.

89. S.J. Res. 19, Cong., (1993) (apology resolution).

90. *Id.*

91. *Id.*

92. *See* S. 147, § 4(b) ("The purpose of this Act is to provide a process for the reorganization of the Native Hawaiian governing entity and the reaffirmation of the political and legal relationship between the United States and the Native Hawaiian governing entity for purposes of continuing a government-to-government relationship.").

93. The Indian Reorganization Act was intended to promote tribes to organize under a Western model for purposes of self-governance and thereby promote democratic values and economic self-sufficiency. For a general description of the Indian Reorganiza-

The Kingdom of Hawaii had accomplished political unification of the traditional island governments; however, today there are many political factions among the Native Hawaiian people.<sup>94</sup> Thus, the United States has an interest in creating a unitary government body that can negotiate with respect to lands and resources. This will be the function of the Native Hawaiian governing entity. Interestingly, the Akaka bill does not attempt to define the ultimate parameters of Native land rights or jurisdiction (it does not, for example, attempt to create a reservation or land trust base), which makes this legislation quite different from comparable federal recognition legislation for Native American tribes. Nor does the Bill grant Native Hawaiians an entitlement to participate in all programs developed for Native Americans and Alaska Natives; instead, Congress can selectively include Native Hawaiians or not. The Bill contemplates a federal administrative apparatus, but is not specific about the budget or authority of such an entity.<sup>95</sup>

Senator Akaka maintains that passage of the Bill is a necessary step toward reconciliation.<sup>96</sup> Many Native Hawaiian people support passage of the Bill and see it as a positive step toward the ultimate restoration of self-government and land rights.<sup>97</sup> Many of these supporters express fear that if they do not endorse the legislation, the few remaining "entitlements" that Native Hawaiian people enjoy will cease as a result of legal challenges filed by non-Natives.<sup>98</sup> There is a great deal of justification for that fear. In 2000, the U.S. Supreme Court held in *Rice v. Cayetano* that a state-sanctioned restriction allowing only Native Hawaiians to vote for the OHA Board of Trustees was unconstitutional under the Fifteenth Amendment.<sup>99</sup> In *Rice*, a non-Native brought suit against the Governor of Hawaii claiming that his exclusion from voting for OHA trustees and from a special election on Native sovereignty violated the Fifteenth Amendment of the Constitution.<sup>100</sup> The state argued that OHA had a fiduciary responsibility to the Native Hawaiian people to manage the assets on their behalf, and this duty justified restricting the election of the trustees to voters with Native ancestry.<sup>101</sup> Additionally, the state argued the classification was political in nature—similar to an Indian tribe—and was

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tion Act of 1934, see Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, (1972).

94. See Murphy, *supra* note 55.

95. S. 147, 109th Cong., § 5 (which would establish the "United States Office for Native Hawaiian Relations" within the Office of the Secretary of Interior).

96. See Murphy, *supra* note 55.

97. See *id.*

98. See *id.*

99. 528 U.S. 495, 524 (2000).

100. *Id.* at 499.

101. *Id.* at 523.



not "racial."<sup>102</sup> A majority of the Court disagreed, finding that the classification was based on ancestry, and as such, was a "proxy for race."<sup>103</sup> Because OHA is a state agency, the Court found, its elections were subject to the Fifteenth Amendment.<sup>104</sup> The Court then held that the Fifteenth Amendment invalidates any electoral qualification based on ancestry.<sup>105</sup>

Throughout the opinion, the Court refers to the multicultural nature of the citizenry of Hawaii and the fact that all "citizens," regardless of race, have an interest in selecting officials who can develop policies on their behalf, even if the policies will affect some groups more than others.<sup>106</sup> The concluding paragraph of the majority opinion is quite telling:

When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.<sup>107</sup>

Although the equal protection question was not addressed in *Rice*, the decision highlights many problematic issues that could be raised with respect to other programs and entitlements that are directed toward the Native Hawaiian people.<sup>108</sup>

A recent opinion from the Ninth Circuit foreshadows the further erosion of Native Hawaiian rights. *Doe v. Kamehameha Schools* involved a challenge by a non-Native student who was denied admission to the Kamehameha Schools because he was not of Native Hawaiian ancestry.<sup>109</sup> The Kamehameha Schools are private, nonsectarian, and commercially operated schools that were created in the late 19<sup>th</sup> century under a charitable testamentary trust established by Princess Bernice Pauahi Bishop, who was a direct descendant of the famous Hawaiian King Kamehameha

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102. *Id.* at 517–22.

103. *Id.* at 514.

104. *Id.* at 520.

105. *Id.* at 523.

106. *Id.*

107. *Id.* at 524.

108. S. 147, Sec. 2(16)(A). The pending legislation lists several programs that are or could be directed toward Native Hawaiian beneficiaries, including language immersion programs, health care services, employment and training programs, educational programs, conservation programs, and various educational programs.

109. *Doe v. Kamehameha Schools*, 416 F.3d 1025 (9th Cir. 2005).

I.<sup>110</sup> The Schools do not receive federal funding.<sup>111</sup> Princess Pauahi expressed her wish to establish the schools and also directed part of the trust's funding to support disadvantaged Native Hawaiians.<sup>112</sup> The Schools trustees interpreted her words to offer a preference to qualified Native Hawaiians.<sup>113</sup> If there are no qualified Native Hawaiians, then qualified non-Natives can be admitted.<sup>114</sup> Thus, while the Schools do not bar non-Natives from attendance, they accord a preference to Natives.

The Ninth Circuit held that the Kamehameha Schools' preference was a violation of federal civil rights legislation because it constituted "invidious discrimination."<sup>115</sup> In a lengthy and complex opinion, the court notes that the Schools admit that its preference is "racial" in nature.<sup>116</sup> The Schools' attorneys did not make the argument that this was a "political" classification, based on the reasoning in *Morton v. Mancari*,<sup>117</sup> which supports the federal government's authority to create "special" programs and benefits for Native American and Alaska Native groups.<sup>118</sup> Nor did the Schools attempt to justify its policy by appealing to a First Amendment right to freedom of association.<sup>119</sup> Because the court found that the policy is racially discriminatory, it applied a heightened standard of scrutiny, but because there is no state action, the court did not apply the 14<sup>th</sup> Amendment equal protection standard of "strict scrutiny."<sup>120</sup> Rather, it applied the "more deferential" form of scrutiny applied to resolve challenges brought pursuant to Title VII of the Civil Rights Act of 1964.<sup>121</sup> Using this standard, the court found that the plaintiff student had established a prima facie case of intentional racial discrimination.<sup>122</sup> The burden then shifted to the defendant to demonstrate a "legitimate nondiscriminatory reason" justifying the challenged practice.<sup>123</sup> The Schools alleged that its policy was a "valid affirmative action plan" rationally related to redressing present imbalances in the socioeconomic and educational achievement of Native

110. *Id.* at 1027.

111. *Id.*

112. *Id.* at 1028.

113. *Id.* at 1029.

114. *Id.*

115. *Id.* at 1027 (holding that the Schools admissions policy constitutes "unlawful race discrimination" in violation of 42 U.S.C. 1981).

116. *Id.* at 1029.

117. *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding an Indian employment preference in the Bureau of Indian Affairs under a rational basis test, on the basis that the "Indian" classification was politically, and not racially, based).

118. *Id.*

119. *Kamehameha Schools*, 528 U.S. at 1027.

120. *Id.* at 1038.

121. *Id.* at 1038–39.

122. *Id.* at 1039.

123. *Id.* at 1039–40.

Hawaiians and designed to produce Native Hawaiian leadership and revitalize Native culture.<sup>124</sup>

The court found the defendants had not met their burden.<sup>125</sup> The court relied on the Weber test, which determines when affirmative action plans are valid. The court found that the Schools policy violated the second prong of that test, which is whether it “creates an absolute bar to the advancement of the non-preferred race or unnecessarily trammels their rights.”<sup>126</sup> The court found that the Kamehameha preference operated as an absolute bar to admission for non-Hawaiians and “unnecessarily trammels their rights” because the denials were purely a product of race. Absolute classifications based on race “threaten to stigmatize individuals by reason of their membership in a racial group and . . . incite racial hostility.”<sup>127</sup> Thus, the “absolute bar to admission on the basis of race is invalid.”<sup>128</sup>

It is ironic that both *Rice v. Cayetano* and *Doe v. Kamehameha Schools* award rights to White people using constitutional and civil rights doctrines that were intended to help minority groups achieve parity with the dominant society and redress their historic exclusion. In each case, the White plaintiff is seeking to share some benefit that has been awarded to Native people to redress a history of injustice. However, under the analysis of both courts, times have changed. Now we are a society committed to “equality,” and Natives cannot discriminate against non-Natives. The Akaka bill purports to provide a federal basis for the “special treatment,” analogous to the doctrines that have developed to protect Native American and Alaska Native rights.<sup>129</sup> Will the Akaka bill solve the problem? The jury is out on that question because it is not clear that Congress has the same authority to enact such legislation for Native Hawaiians under the Commerce Clause of the U.S. Constitution as it does for Indian tribes.<sup>130</sup> The Commerce Clause gives Congress the sole and exclusive authority to regulate trade with Indian tribes. The federal government claims that the provision extends to Native Hawaiians on the theory that they are “indigenous peoples,” just like Indians are “indigenous peoples,”

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124. *Id.* at 1040.

125. *Id.* at 1041.

126. *Id.*

127. *Id.* at 1042.

128. *Id.*

129. See S. 147, 109th Cong. (2005).

130. See, e.g., Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 561–62 (1996) (arguing the federal government's Commerce Clause authority to regulate trade with “Indian tribes” does not extend to Native Hawaiians).

and this makes them eligible for special protection.<sup>131</sup> There is authority for that position with respect to groups such as the Pueblos in New Mexico, which were annexed into the U.S. after they had already received land grants from Spain and were "citizens" of Mexico, but were nonetheless "Indians in character and custom" and thus were held to be subject to the special protection and authority of the United States.<sup>132</sup> However, the Kingdom of Hawaii enjoyed international recognition, which makes Native Hawaiians unique among all indigenous groups now in the United States.

This fact inspires some Native Hawaiians to resist the Akaka bill.<sup>133</sup> The proponents of Hawaiian independence claim that the Kingdom of Hawaii was overthrown in an illegal military coup, and was annexed into the United States in violation of both international law and domestic constitutional law.<sup>134</sup> They claim that because the citizens of the Kingdom of Hawaii never consented to the annexation, Hawaii is a country under military domination and justice requires that they be accorded a right of self-determination.<sup>135</sup> They claim that it is a further violation of their rights to offer them the subordinate status of "domestic dependent nation," like an Indian tribe, when they are in reality a Nation.<sup>136</sup>

The political controversy over the Akaka bill raises many interesting issues, which have yet to be resolved. Even if the Akaka bill is enacted into law, it is possible that a future claimant will file a legal attack questioning Congress authority to pass this legislation. For purposes of this essay, however, the politics of this case study merit analysis under the CRT frameworks that have been developed.

#### IV. RACIAL HEALING AND THE ROLE OF TRANSFORMATIONAL THOUGHT

In his book, *Interracial Justice*, Eric Yamamoto evaluates racial healing by examining some of the most daunting racial conflicts in our history. His book also explores the struggle of communities of color to engage each other and the dominant society, and to heal the wounds caused by

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131. See S. 147, § 2(1) (finding "the Constitution vests Congress with the authority to address the conditions of the indigenous native people of the United States"; see also S. 147, § 2(2) (finding that "Native Hawaiians . . . are indigenous native people of the United States").

132. See *United States v. Sandoval*, 231 U.S. 28, 47 (1913) (holding the Pueblo lands were "Indian Country," subject to federal regulation, because the Pueblos were "Indians" for purposes of federal law).

133. See Kanehele, *supra* note 63, at 67–68; see also Nihipali, *supra* note 62, at 42–44.

134. Nihipali, *supra* note 62, at 42–44.

135. *Id.*

136. *Id.*

these conflicts.<sup>137</sup> This is a transformative account of interracial healing and interracial justice; one that depends upon a rich understanding of discourse, as well as the material articulation of rights within our legal structure. In an earlier article titled "Race Apologies," Professor Yamamoto noted the interdependency of the idealist and materialist perspectives, observing that:

reconciliation through framing of a new societal narrative requires more than survivor storytelling and incomplete apologies. When those suffering see material change in societal attitudes and institutional structures, when some form of meaningful reparations is forthcoming, then . . . those disenfranchised may sense a kind of justice that contributes to inter-group healing.<sup>138</sup>

The upshot of this perspective is to note that idealist and materialist frameworks are essential to the type of restructuring that will be necessary to accomplish "racial healing." There is no "one size fits all." In line with Teitel's work, which conceptualizes justice as "extraordinary" and "constitutive of transformation," the role of justice is to transcend the binary categories that currently structure our debates.<sup>139</sup> The three central pillars of CRT enable this discussion to occur. CRT offers a conceptual framework to gain knowledge about injustice, to create concepts of racial "equality" that address the historical or contemporary forms of injustice, and to generate epistemologies that have the capacity to create structures that may currently be outside of our "reality."<sup>140</sup> However, those structures may one day constitute our "reality" if we work at the higher level of possibility.

I will conclude this essay by suggesting how that process of envisioning might work in Hawaii. Today, the Native Hawaiian people are being told that they have a choice. First, they can "assimilate" into the "multicultural" citizenry of Hawaii as a state within the U.S. The majority in *Rice* sees this as the preferred solution because the Constitution is the "common heritage" of all citizens.<sup>141</sup> The dominant society would see this as a satisfactory solution. Justice is accomplished through "equality" as citizens. Non-natives and Natives are treated "alike." They are protected by the Constitution. The history of the Kingdom of Hawaii is, under this view, irrelevant. It is a nice memory, but the Native Hawaiian people can-

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137. ERIC YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999).

138. Eric Yamamoto, *Race Apologies*, 1 J. GENDER, RACE & JUST. 47, 67 (1997).

139. TEITEL, *supra* note 30, at 4.

140. See discussion *supra* notes 18–26 and accompanying text.

141. 528 U.S. at 524.

not stay in their "past." They must move ahead to be part of "America," just like all the other ethnic and immigrant groups. The Ninth Circuit's analysis in *Kamehameha Schools* continues this logic. Native Hawaiians may still suffer from social inequity, the Court finds, but they cannot use racially discriminatory methods to equalize themselves because this disadvantages non-Natives. Again, all "citizens" must be treated alike under the U.S. civil rights laws.

The second choice being posed to Native Hawaiians under the auspices of the Akaka bill is to have a separate political status as a form of "domestic dependent nation."<sup>142</sup> The United States has committed itself to this model by developing the jurisprudence of Federal Indian law, which centers around the "political" rather than "racial" status of federally-recognized Native American and Alaska Native peoples. This political status is used to justify federal programs that are directed to the benefit of federally-recognized Native groups. Indians who lack federal recognition do not share this status, and it is unclear whether there is even a satisfactory racial category for those people. In many ways, their cultural or ethnic identity is truly irrelevant. For legal purposes, they are most often treated the same as White people.<sup>143</sup> The United States cannot claim that the Native Hawaiians did not have a separate political status, nor can it claim that the United States has not recognized a special relationship and obligation through federal enactments such as the Hawaiian Homes Commission Act<sup>144</sup> and the Apology Resolution.<sup>145</sup> The United States also recognizes that there are serious legal problems over ownership of certain lands and resources as a result of this distinctive history; therefore, the best solution from the perspective of the United States is to treat Native Hawaiians like Indians—or at least in a similar manner. This is arguably consistent with federal law (assuming that the Indian Commerce Clause applies to Native Hawaiians) and emerging international human rights norms which specify that indigenous peoples' rights to land, resources, and culture ought to be respected under domestic law.<sup>146</sup> So, is the Akaka bill a satisfactory way to achieve "justice" for Native Hawaiians? Will it lead toward "reconciliation" (which presumably entails racial healing)? And, perhaps most important of all, are these two "solutions" truly the only possibilities?

In evaluating these questions, let us first look at the role of CRT in generating knowledge about the nature of "injustice." Eric Yamamoto's

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142. S. 147, 109th Cong. (2005).

143. See ROBERT E. CLINTON, CAROLE E. GOLDBERG AND REBECCA TSOSIE, *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 120–23 (4th ed. 2003)(noting the legal distinctions among Indian Tribes based on "federal recognition").

144. Act of July 9, 1921, Pub. L. No. 34, 42., 42 Stat. 108.

145. S. J. Res. 19, 103d Cong. 107 Stat. 1510 (1993).

146. See generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (1996) (examining the role of international law in protecting the rights of indigenous peoples).

book contains an entire chapter devoted to the history of the reparations movement in Hawaii and the role of the Christian Churches.<sup>147</sup> It is a fascinating story that describes the dialogue and the feelings that were expressed between Church leaders and Native leaders, and indeed, among Church leaders who are also Native Hawaiians. That dialogue is emotional, evoking the deep spiritual wounds occasioned by this history of injustice.<sup>148</sup> There are other relevant dialogues, of course. The dialogue about the significance of the Kingdom of Hawaii and the political and legal history of the Kanaka Maoli is told in a variety of forums, including sites where Independence leaders have made political statements and taken the activist road to protest conditions of injustice.<sup>149</sup> There is also a dialogue among Native Hawaiians who continue to protest the development of sacred sites, the desecration of burial sites, and a host of other cultural concerns.<sup>150</sup> These dialogues elicit the truth that is fully present in the contemporary lives of Native Hawaiian people: Native Hawaiians ARE a distinctive people with a separate political and cultural identity. In many ways, non-Natives have appropriated parts of this identity (the Hula, Lomi Lomi, etc.) in order to carve out a separate identity for the State of Hawaii that will appeal to tourists.<sup>151</sup> However, the original identity of the Hawaiian people continues on. It is expressed in their language, in particular places, in ceremonies, in the recounting of genealogies and histories. It is present and it is alive. This work, which might be called "discourse analysis" is fundamental to eliciting the truth of who the Native Hawaiian people really are. They are not "Indians." They are not merely "indigenous peoples." They are the Kanaka Maoli and they are the contemporary descendants of the Kingdom of Hawaii, which never voluntarily surrendered to the United States.

Now, what do we DO with that truth? Can we construct an alternative reality? Kunani Nihipali speaks of living in the "illusion of reality" in which the only options that are offered to the Hawaiian people are those that would serve the interests of the very country that sits in wrongful occupation of the Hawaiian islands.<sup>152</sup> Hawaiian leaders such as Nihipali and Kanahele are committed to independence, to reinstating the Nation of Hawaii as co-equal with the United States, and NOT as a "de-

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147. YAMAMOTO, *supra* note 137, at 210–35.

148. *Id.* at 212.

149. See Kanahele, *supra* note 63, at 70.

150. Nihipali, *supra* note 62 (offering a detailed account of the work undertaken by Hui Malama in service of the ancestors and the culture that have enabled the survival of the Hawaiian people).

151. See HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII, 2–3, 17 (1993).

152. Nihipali, *supra* note 62, at 38, 44.

pendent" of the United States.<sup>153</sup> Political equality, under this analysis, requires equality of Nations, and not equality of citizens. Nihipali describes the Akaka bill as "an example of how structures and strategies of domination created under colonialism are transferred and re-deployed by the formerly colonized to make us indistinguishable from the rest of American society. It is a self-colonizing assimilation tool which, if allowed to continue, could inevitably lead to our extinction."<sup>154</sup> Examining the concept of justice through the CRT lens of "equality" demands that we consider the notion of "equality of nations" as a possibility to achieve justice for and reconciliation with the Native Hawaiian people. Within CRT frameworks, we are aware that formal equality, as a matter of constitutional and civil rights law, can and often does disadvantage people of color and benefit the dominant society.<sup>155</sup> CRT enables us to transcend formal equality and, building on the truth of the political, social, economic and spiritual conditions experienced by a people, to analyze alternative possibilities to achieve justice.

Finally, let us look at how alternative epistemologies can be employed to create those possibilities. In undertaking this analysis, I will draw on a work that I co-authored a few years ago with Wallace Coffey on the topic of "Cultural Sovereignty," which was inspired by the need for transformative thought within Federal Indian law.<sup>156</sup> As most of us know, the political and legal construction of Native sovereignty in the U.S. is quite far removed from the notion of tribal sovereignty that exists in the hearts and minds of Native people. Within Federal Indian Law, tribal governments are considered "domestic dependent nations," which is a status that is definitely NOT equal to other nations.<sup>157</sup> Thus, Indian tribes, unlike European nations, were considered to have only a "right to occupancy," and not the territorial rights of a "real" nation.<sup>158</sup> Furthermore, because they were perceived to be in a rudimentary state of governance, they were deemed to be "wards" of the federal government, which had a "guardianship" role that ensured its superior power.<sup>159</sup> Over the years, this status has been associated with diminished jurisdictional rights. Cases such as *Oliphant v. Suquamish Tribe*, *Montana v. United States*, and *Strate v. A-1*

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153. *Id.* at 44 (discussing the process of reviving the Hawaiian nation as one that is both spiritual and political in nature).

154. *Id.* at 44.

155. See, e.g., Cheryl Harris, *Whiteness as Property* in *CRITICAL RACE THEORY*, *supra* note 20, at 287.

156. See Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 *STAN. L. & POL'Y REV.* 191 (2001).

157. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (distinguishing "domestic dependent nations" from "foreign nations").

158. *Johnson*, 21 U.S. at 574.

159. See, e.g., *United States v. Kagama*, 118 U.S. 375, 383–84 (1886) ("Indian tribes are the wards of the nation. They are communities dependent on the United States.").



*Contractors* term Indian nations to have a sort of “quasi-sovereign status” when they regulate their own tribal relations; however, their sovereignty is “diminished” by the overriding sovereignty of the U.S., and to the extent that they attempt to exercise jurisdiction over non-Indian citizens, they do not exercise the full range of sovereign powers that other nations (or even states) would enjoy.<sup>160</sup> The notion that Indian nations are not fully socialized or civilized also creeps into these cases, masked as a fear that tribes will not respect the “civil rights” of non-Indians, or even non-member Indians.<sup>161</sup>

These notions support the location of privilege and power in the federal government, sometimes in the state governments, but definitely not with the tribal governments. The ensuing problems, such as lack of any meaningful tribal jurisdiction over assaults and domestic violence between non-Indians and Indians, are treated as a “social condition,” amenable perhaps for federal funding to “study” the problem. But no one seriously questions the validity of the basic structure. After all, everyone knows that tribes are not “really” sovereigns, right? And, haven’t they always been subject to these doctrines?

The answer, quite simply, is “no.” We have been socialized and conditioned to accept this status as the “reality” of things. But, it is NOT. How many of us remember a time before any European peoples arrived? The oral histories of Native peoples tell about that time. How many of us remember the time when the Europeans came crawling to tribal leaders for their support and protection against enemy groups—both Native and non-Native? The first treaties between the U.S. and the Native Nations tell that story, such as the 1778 Treaty of Ft. Pitt with the Delaware Nation, in which the U.S. officials begged the Delaware leaders to have “safe passage” through “their country” and also begged for military assistance from Delaware warriors against the evil King of England.<sup>162</sup> Who were the “Americans” at that time? Did they think they had the “right” to claim title to Native land? NO. Did they think they had the right to disinter Native remains and cart them off to museums and laboratories? No. Did they think that they had the right to unilaterally command the Delawares to obey their laws? NO, no, and no. The Seneca Treaty of Canandaigua is

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160. See *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (holding that tribal court lacked jurisdiction to adjudicate a tort lawsuit between two non-Indians that arose on the reservation); *Montana v. United States*, 450 U.S. 544, 565–66 (1981) (holding that Indian tribe was implicitly divested from authority to regulate non-Indian hunting and fishing on fee lands within the reservation); *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 208–09 (1978) (holding that Indian tribes have been implicitly divested of criminal jurisdiction over non-Indians who commit crimes on the reservation).

161. See e.g., *Oliphant*, 435 U.S. at 210 (discussing the interest of the federal government in ensuring that non-Indian citizens are protected against “unwarranted intrusions on their personal liberty”).

162. CLINTON, ET AL., *supra* note 143, at 4–5.

to the same effect.<sup>163</sup> These were treaties between NATIONS, engaged in a spirit of diplomacy.

So, what happened? That is much too complex to engage within the space of this essay. But, a big part of what happened is that Native people started to believe that this is the way things always were. We could blame the boarding schools and other forcible assimilation programs; we could blame genocide and forced dependency for the resultant scars that cut deep into Native communities today. And, of course, that is all true. But, don't we have to take the responsibility to envision our own reality? That is the promise of what Comanche tribal leader, Wallace Coffey, and I wrote about in our article on "Cultural Sovereignty." Cultural sovereignty, we said, "is the effort of Indian nations and Indian people to exercise their own norms and values in structuring their collective futures."<sup>164</sup> If the U.S. Supreme Court dares to define Native sovereignty as "subject to complete defeasance" by the United States, then it is up to us to assert that inherent sovereignty is NOT dependent upon any grant, gift, or acknowledgment by the U.S. government.<sup>165</sup> Inherent tribal sovereignty preexists the arrival of the European people and the formation of the U.S. It is up to Native people to define, assert, protect, and insist upon respect for the right to be what they have always been: distinctive governments and societies, autonomous and free. But we first have to resist the colonial enterprise, which uses external power to define the "other" as subordinate to the colonial nation.<sup>166</sup> We have to take back our power and construct tribal sovereignty from WITHIN Native societies.

It strikes me that this is exactly what is happening right now in Hawaii. According to the New York Times article, the Akaka bill would "grant" Native Hawaiians "sovereignty."<sup>167</sup> This is a dangerous statement for two reasons. First, the United States cannot "grant" sovereignty. Inherent sovereignty comes from within; it is retained by the people. It is an attribute of a people that maintain their own government, their own set of laws, and exist within their own territory. The U.S. Supreme Court is getting close to deciding if tribes in fact DO have inherent sovereignty. In *United States v. Lara*, Justice Thomas wrote a separate opinion declaring the Supreme Court must decide once and for all if tribal sovereignty is subject to complete defeasance, as the Court has said, through the exercise

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163. See generally G. PETER JEMISON & ANNA M. SCHEIN, *TREATY OF CANANDAIGUA 1794: 200 YEARS OF TREATY RELATIONS BETWEEN THE IROQUOIS CONFEDERACY AND THE UNITED STATES* (2000) (describing the historical background and contemporary relevance of the Treaty of Canandaigua).

164. Coffey & Tsosie, *supra* note 156, at 196.

165. *Id.* at 194-95 (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

166. See generally Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75 (2002) (giving an account of Native sovereignty that starts with indigenous understandings).

167. See Murphy, *supra* note 55.

of plenary power.<sup>168</sup> If it is, he claims, tribes are NOT sovereigns and the doctrine of “inherent or retained sovereignty” is a fiction. At that point, tribes would then be merely self-governing administrative units of the federal government, as the dissenting justices in *Lara* maintained.<sup>169</sup> Secondly, the Native Hawaiian people do not need the federal government to grant them sovereignty. If they have maintained their political identity, they have maintained their sovereignty. What the Native Hawaiian people need is for the United States to recognize that sovereignty on terms that are acceptable. The status of “equal citizen” is unacceptable because it negates the political identity of the Native Hawaiian people. The status of domestic dependent nation is acceptable to some Hawaiian people because it ensures some separate political status and unacceptable to others because of the reliance on dependency.<sup>170</sup> The status of “nation” is acceptable to proponents of independence, but is probably unacceptable to the United States because it has a huge reliance on the value of the Hawaiian islands for commercial, economic and military purposes. Are there other possibilities?

At least one other possibility has been raised: the idea of “free association” through a compact between the Nation of Hawaii and the United States.<sup>171</sup> The Nation of Hawaii would be on the road to full independence, but would contract with the United States for a structured relationship over many years that would meet the needs of both parties. This is the type of relationship that the Nation of Palau enjoys with the United States, and it is a model for other nations in the South Pacific.<sup>172</sup> That model may be more culturally consistent with the political and historical reality of Hawaii than the Native American tribal governance model.

Finally, it may be possible to look at what is happening in Canada with the new territory of Nunuvut.<sup>173</sup> This is a distinctively Inuit territory, although it is constituted as a province of Canada. The character of Nunuvut, which is predominantly Native, allows for new forms of territorial, language, and educational rights. Nunuvut’s laws are distinctive and designed to enable indigenous self-determination within a domestic, de-

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168. United States v. *Lara*, 541 U.S. 193, 214 (2004) (opinion of Thomas, J.).

169. *Id.* at 226 (Souter, J. and Scalia, J., dissenting).

170. See *Nihipali*, *supra* note 62, at 44.

171. See also *Cross-Cutting Themes in Hawaii: Native Hawaiian Rights, Perceived Racial Differences, and the Desire to Restore Hawaiian Sovereignty*, NARF LEGAL REVIEW, vol. 28, no.1 (Winter/Spring 2003) (outlining possibilities for self-determination for Native Hawaiian people under the models of free association that are applicable to other trust territories in the Pacific Islands).

172. *Id.*

173. See generally Thomas Isaac, *The Nunavut Agreement-In-Principle and Section 35 of the Constitution Act, 1982*, 21 MANITOBA L.J. 390 (1992).

mocratic participatory structure.<sup>174</sup> This is not an independent nation model, and the status of the Inuit people is far more similar to the Native Alaskan groups than to the Native Hawaiians. So, it may not be a possibility at all. Yet, it is another example of how contemporary governments can craft new and creative models to fit the cultural and political character of Native peoples within their borders.

## CONCLUSION

I was deeply honored to participate in this Symposium with scholars who I recognize and admire as leaders in the area of Critical Race Theory. In particular, I am intrigued by two thoughts raised by Richard Delgado in the opening Keynote address.<sup>175</sup> He referred to a process of “psychic healing” that occurs when people begin to recognize that their oppressed condition is not their fault. We have not given sufficient attention to the process of “self-healing,” and this is another place that CRT can accomplish important work. I am reminded of Assistant Secretary Kevin Gover’s apology for the past bad acts of the Bureau of Indian Affairs toward Native American people, including forcible assimilation, forced dependency, and outright physical genocide.<sup>176</sup> In that apology speech, Assistant Secretary Gover, a member of the Pawnee Tribe, acknowledged that the intergenerational harm of those misdeeds continues to haunt Native people, and manifests in Native communities in various negative ways:

The trauma of shame, fear, and anger has passed from one generation to the next, and manifests itself in the rampant alcoholism, drug abuse, and domestic violence that plague Indian country. Many of our people live lives of unrelenting tragedy as Indian families suffer the ruin of lives by alcoholism, suicides made of shame and despair, and violent death at the hands of one another.<sup>177</sup>

Assistant Secretary Gover’s apology was intended, on a spiritual level, to set in motion a process of self-healing, by acknowledging the truth about what happened, redirecting blame, healing spiritual trauma, and promoting a sense of collective responsibility on the part of the U.S. government for this history. In many ways, this approach reflects Native

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174. *Id.*

175. Richard Delgado, Keynote Address at the Michigan Journal of Race and Law Symposium, *Going Back to Class: The Reemergence of Class in Critical Race Theory* (February 5, 2005) (hereinafter *Keynote Address*).

176. Congressional Record, 106th Cong. 2d. Sess., 2000. Vol. 146, pt. E 1453-03 (Sept. 8, 2000) (comments of Kevin Gover).

177. *Id.*

cultural views that associate “justice” with healing.<sup>178</sup> For example, the peacemaking traditions of the Navajo people emphasize the need to restore group harmony when individuals have harmed others.<sup>179</sup> This is accomplished through the use of songs, stories, and rituals that remind individuals of the appropriate norms that were set in place long ago to ensure a good life for the Dine people.<sup>180</sup> As Eric Yamamoto observes, the focus in such a system “is not on fault but on why the people are in disharmony and what can be done. By emphasizing their relationship in the community, justice enables them to rejoin the community spiritually and socially.”<sup>181</sup> Thus, I want to underscore the importance of Professor Delgado’s reference to “psychic” or “spiritual” healing and to suggest that this may be an appropriate future direction for CRT scholars who are engaged in the epistemic debates about the nature of “justice.”

Professor Delgado made a second point that I found quite important.<sup>182</sup> He queried the meaning of the concept of “justice,” asking whether it is found in a civil rights case or whether it is found at some higher level. CRT enables us to engage in a practice of transformative thought, acknowledging truths about our experience and the possibilities for our future. It enables us to commence a process of self-healing and allows us to contemplate what conditions would have to exist to reach reconciliation about past injustice and to overcome present injustice. The “illusion of reality” is found in the formalistic structures of law that define and limit our possibilities for the future. However, we, as CRT scholars and members of the communities that have experienced injustice, have the capacity to imagine a far different reality. We also have the training and institutional access necessary to bring that reality into being. The “idealist” and “materialist” frameworks operate simultaneously in this process. As Derrick Bell wrote in the afterword to *Crossroads, Directions and a New Critical Race Theory*:

Our writing is our art. Like all art, it may come in many forms, but it must be grounded in truth as we see it. That truth may and will evolve with our understanding and come to reflect the wisdom that emerges with experiences. [CRT scholars] offer unusual perspectives and unflinching insights into the evils of

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178. See generally, *JUSTICE AS HEALING: INDIGENOUS WAYS* (Wanda D. McCaslin, ed. 2005).

179. Robert Yazzie, *Healing as Justice: The Navajo Response to Crime*, *supra* note 179, at 121–33.

180. *Id.* at 125.

181. YAMAMOTO, *supra* note 137, at 167.

182. Delgado, *Keynote Address*, *supra* note 175.

our time. That is our mission in life, and our contribution to the future.<sup>183</sup>

Other scholars may criticize CRT scholarship as “unrealistic,” as “biased” and perhaps claim that we are straying too far afield from the “rational” formality of Anglo-American jurisprudence. But it is precisely because CRT scholars are able to transcend the ordinary categories that have defined our “reality” that we may one day be able to redefine that reality in ways that are more appropriate for the future of the people who we serve: our ancestors, our relatives, and the future generations.

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183. Derrick A. Bell, *The Handmaid's Truth*, in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* 412 (Francisco Valdes et al., eds. 2002).